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March 10, 1998

EX PARTE PRESENTATION

RECEIVED
MAR 10 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Via Hand Delivery

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Petitions Seeking Preemption of Certain Provisions of the Arkansas Telecommunications Regulatory Reform Act of 1997, CC Docket No. 97-100

Dear Ms. Salas:

On March 9, 1998, Michael Kellogg, Todd Silbergeld, and I, representing Southwestern Bell Telephone Company ("Southwestern Bell"), met with Alex Starr, Jonady Hom, and Jonathan Askin of the Common Carrier Bureau's Policy and Program Planning Division. Garry Wann and Edward Drilling, who are General Attorney and Director-External Affairs, respectively, for Southwestern Bell in Arkansas, participated by telephone. The purpose of the meeting was to discuss Southwestern Bell's responses to the questions posed by the staff in its memorandum dated February 25, 1998. In response to the staff's request, Southwestern Bell provided copies of each of the eleven orders of the Arkansas Public Service Commission ("Arkansas PSC") in Docket No. 96-395-U and with copies of all orders approving interconnection agreements between Southwestern Bell and competing local exchange carriers in Arkansas since August 1997. In addition, Southwestern Bell provided copies of three orders of the Arkansas PSC entered since February 18, 1998 and a copy of a letter from Governor Mike Huckabee to the Arkansas PSC.

Southwestern Bell's written responses to the staff's questions and the Governor's letter are attached. In accordance with the Commission's rules governing ex parte presentations, I am providing two (2) copies of the enclosed letter. Thank you for your consideration.

Sincerely,

Geoffrey M. Klineberg

Enclosures

cc: Alex Starr
Jonady Hom
Jonathan Askin

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RESPONSES OF SOUTHWESTERN BELL TELEPHONE COMPANY TO THE FCC'S QUESTIONS CONCERNING THE IMPACT OF ORDER NO. 11 ON CC DOCKET NO. 97-100

1. What happens next in the arbitration proceeding? What further steps need to be taken, if any, before the Arkansas Commission issues a final, appealable order? Approximately when will those steps be completed? Do you anticipate that an appeal will be taken?

Within the next ten days, Southwestern Bell Telephone Company ("SWBT") will file a motion for reconsideration and/or clarification of Order No. 11. In SWBT's view, the Arkansas Public Service Commission ("Arkansas PSC") should clarify its decision in Order No. 11 by (1) explaining how each open issue has been resolved in such a way that it meets the requirements of section 251, including the valid regulations prescribed by the Federal Communications Commission ("FCC") pursuant to section 251; and (2) making specific findings concerning the just and reasonable rates for interconnection, network elements, and resale.

In the meantime, SWBT and AT&T will continue negotiations to resolve the remaining issues and present a final interconnection agreement to the Arkansas PSC for its approval. The Arkansas PSC will then have thirty days to enter an order approving or rejecting the agreement, and any party aggrieved may seek review of that determination in federal district court pursuant to 47 U.S.C. § 252(e)(6).

2. Did either SWBT or AT&T argue to the Arkansas Commission that "Act 77 and its impact on the [Arkansas] Commission's authority to arbitrate interconnection issues were not fully and appropriately addressed in Order No. 5"? *See* Order No. 11 at 2. If so, please describe the argument and bring copies of the pleadings that made the argument.

SWBT never argued that Act 77 and its impact on the Arkansas PSC's authority were not fully and appropriately addressed in Order No. 5. As far as SWBT knows, AT&T never made such an argument either.

3. After the Arkansas Commission issued Order No. 5, did either SWBT or AT&T urge the Arkansas Commission to adopt the reasoning or the results articulated in Order No. 11? If so, please describe the argument and bring copies of the pleadings that made the argument.

SWBT never urged the Arkansas PSC to adopt the reasoning articulated in Order No. 11. Of course, SWBT did argue that the Arkansas PSC should reconsider various decisions reached in Order No. 5, and the result of Order No. 11 has been to reverse those decisions. SWBT is not aware of any public statements by AT&T urging the adoption of the reasoning or results reached in Order No. 11.

4. One of the Arkansas Commission's core conclusions in Order No. 11 is the following: "Pursuant to the restrictions on the Commission's authority in Act 77, the Commission has no authority to order SWBT to provide interconnection, resale or unbundling to AT&T on any different terms or conditions than SWBT will agree to provide such services to a competitor if those terms and conditions meet the *minimum requirements for interconnection specified in Sec. 251* of the 1996 Act." Order No. 11 at 4 (emphasis added). What is the source of the "minimum requirements" of section 251 to which the Arkansas Commission refers? Is it the language of section 251 itself, or the FCC's *Local Competition Order* (11 FCC Rcd 15499, Aug. 8, 1996), or both?

The "minimum requirements" of section 251 are defined by both the language of the section itself and by lawful regulations promulgated by the FCC to implement particular provisions of section 251. To the extent that the FCC's *Local Competition Order*, 11 FCC Rcd 15499 (1996), is consistent with the 1996 Act and has not been invalidated by the United States Court of Appeals for the Eighth Circuit, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997),

motion to enforce the mandate granted, 1998 U.S. App. LEXIS 1043 (8th Cir. Jan. 22, 1998), *cert. granted*, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (Nos. 97-826 et al.), it binds telecommunications carriers engaged in interconnection negotiations as well as State commissions arbitrating and reviewing the agreements. Indeed, a State commission, "[i]n resolving by arbitration . . . any open issues and imposing conditions upon the parties to the agreement," is explicitly directed to "ensure that such resolution and conditions meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission* pursuant to section 251." 47 U.S.C. § 252(c) (emphasis added). The Arkansas PSC was therefore required to resolve the open issues presented to it in a manner consistent with the federal Act and with the valid requirements imposed by the *Local Competition Order*.

5. In light of Order No. 11, can the Arkansas Commission interpret for itself what constitutes the "minimum requirements" of section 251 in a manner that supplements or exceeds the requirements specified in the FCC's *Local Competition Order*? Put differently, does Order No. 11 indicate that the Arkansas Commission believes that section 9 of the Arkansas Act precludes the Arkansas Commission from imposing on incumbent LECs any interconnection, unbundling, or resale obligation beyond those specified in the *Local Competition Order*?

The Arkansas PSC can — indeed, must — interpret for itself what constitutes the "minimum requirements" of section 251 and is not limited to the requirements specified in the FCC's *Local Competition Order*. In Order No. 11, the Arkansas PSC has interpreted the Arkansas Act only to preclude it from imposing on incumbent LECs any interconnection, unbundling, or resale obligation *beyond* those required by federal law. This is not only a correct interpretation of the Arkansas Act, but it is entirely appropriate for the Arkansas General Assembly to limit the authority of its own PSC to impose only those terms and conditions that are

required by federal law. To the extent that the Arkansas PSC believes that section 251 requires interconnection, unbundling, or resale that is not explicitly required in the *Local Competition Order*, the PSC *may* under Arkansas law — and *must* under federal law — impose those obligations. Of course, any party aggrieved by such a decision may seek judicial review on the grounds that the Arkansas PSC was mistaken about the requirements of federal law.

6. In its comments to ACSI's petition, AT&T stated:

> **[T]he 1996 Act authorizes and "requires" detailed regulation to implement the Act's core substantive provisions that access and interconnection be provided at rates, terms and conditions that are just, reasonable and nondiscriminatory. For example, the Act may require a state commission to go beyond the "minimal" regulations established by the Commission's implementing regulations, as the Commission's . . . [*Local Competition Order*] recognizes. Thus, if properly construed, *the Arkansas Act should not restrict the ability of the . . . [Arkansas Commission] to implement the 1996 Act.***

AT&T Comments at 2 n.1 (emphasis added). Assuming, *arguendo*, that AT&T's statement was valid prior to Order No. 11, does it retain its validity after Order No. 11?

Yes. If the Arkansas PSC believes that it is required under section 251 to impose certain terms and conditions upon the parties to an interconnection agreement, then the Arkansas Act would permit the Arkansas PSC to do so — and federal law would require it do so — regardless of whether the FCC recognized such terms and conditions in its *Local Competition Order*. But just as the Arkansas General Assembly is free to expand certain obligations beyond those mandated by federal law, it is also free to withhold from the Arkansas PSC the ability to impose additional requirements *not* mandated by federal law. That is precisely what it has done here. In Order No. 11, the Arkansas PSC correctly concluded that, if SWBT agrees to provide interconnection,

resale, and unbundling on terms and conditions that meet the minimum requirements for interconnection specified in Section 251 of the 1996 Act, including the regulations prescribed by the FCC pursuant to section 251, then the Arkansas Act prohibits the PSC from requiring anything more.

7. **In its comments to MCI's petition, SWBT stated:**

> **There is nothing in the Arkansas Act requiring the Arkansas PSC to limit the range of unbundled elements to those expressly delineated in the [FCC's *Local Competition Order*]; indeed, the Arkansas PSC has already directed SWBT to make available "elements" that were not required to be unbundled in this Commission's [*Local Competition Order*].**

SWBT Comments at 16-17. Assuming, *arguendo*, that SWBT's statement was valid prior to Order No. 11, does it retain its validity after Order No. 11?

SWBT continues to believe that there is nothing in the Arkansas Act requiring the Arkansas PSC to limit the range of unbundled elements to those expressly delineated in the *Local Competition Order*. The statutory requirement for unbundling is clear: incumbent LECs have a duty to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(3). Congress granted explicit authority to the FCC to "determin[e] what network elements should be made available for purposes of subsection (c)(3)," id. § 251(d)(2), and the FCC enumerated those elements in its *Local Competition Order*. If the Arkansas PSC concludes that a particular "facility or equipment" satisfies the definition of "network element" in section 153(29) and meets the access standards provided in section 251(d)(2), then it may order SWBT to provide unbundled access to it even if it is not included on

the "minimum" list of network elements provided in the *Local Competition Order*. Of course, the PSC's conclusion may be wrong as a matter of federal law, and an aggrieved party can seek review of any such conclusion in federal court.

In Order No. 11, the Arkansas PSC reversed its prior order in which it required SWBT to make available elements that were not required to be unbundled under the federal Act. It did so on the grounds that, since "the terms and conditions offered by SWBT meet the minimum requirements of Sec. 251 of the 1996 Act," the Arkansas PSC "lacks the authority to require SWBT to enter into an interconnection agreement on terms different from those which SWBT will agree to provide interconnection, resale and unbundling to AT&T" (Order No. 11 at 5). Since SWBT can have no obligation under federal law to provide more than the federal law requires, the Arkansas PSC's interpretation of its authority is consistent with its duties under the federal Act.

8. As stated above, the Arkansas Commission concluded in Order No. 11 that it must approve the terms of interconnection, unbundling, and resale offered by SWBT as long as these terms meet the minimum requirements of section 251. In Order No. 11, the Arkansas Commission also "reverse[d] Order No. 5 on *any* interconnection, resale, and unbundling issues, with the exception of pricing, which adopted the position of AT&T." Order No. 11 at 5 (emphasis added). In Order No. 5, however, the Arkansas Commission often adopted the position of AT&T precisely because it believed that doing so was necessary to comply with the minimum requirements of section 251. *See* Order No. 5 at 7 (resale of promotions), 8-9 (resale of distance learning services), 9-11 (presumptive unreasonableness of resale restrictions), 25-28 (unbundling of dark fiber), 30-31 (unbundling of multiplexing and other services), 36-37 (collocation in huts and vaults), 37-38 (bill and keep method of reciprocal compensation), 38-39 (geographic scope of local calling areas), 40-41 (dialing parity for intraLATA calls), 41-43 (access to poles, ducts, and conduits), 57 (equal access to services, UNEs, interconnection, and ancillary functions). How do you square the Arkansas Commission's professed standard of adherence to the minimum requirements of section 251, with the Arkansas Commission's reversal of *all* non-

pricing decisions favoring AT&T, including apparently decisions rendered originally to meet the minimum requirements of section 251?

There is, of course, nothing wrong with the Arkansas PSC's decision to reconsider its prior order on the grounds that the PSC had incorrectly determined that the federal Act required the parties to include certain terms and conditions of interconnection, resale, or unbundling into their agreement. Indeed, many of the decisions reached by the Arkansas PSC in Order No. 5 were obviously incorrect: there should be, for instance, no requirement for SWBT to provide "dark fiber," because it is not a "facility or equipment *used* in the provision of a telecommunications service," 47 U.S.C. § 153(29) (emphasis added); similarly, the Eighth Circuit's decision to invalidate the FCC's rule concerning bill-and-keep arrangements (47 C.F.R. § 51.713) undermines the Arkansas PSC's reliance on that very rule in imposing the bill-and-keep method of reciprocal compensation. The problem with the PSC's decision in Order No. 11 was not that it limited SWBT's obligations to the minimum requirements of section 251 and the *Local Competition Order* — rather, it was in the way it broadly reversed its prior decisions without explaining how SWBT's particular proposals satisfied the requirements of section 251 and the *Local Competition Order*. As indicated above, SWBT intends to file a motion for reconsideration and/or clarification of Order No. 11, requesting that the Arkansas PSC explain how each open issue has been resolved in such a way that it meets the requirements of section 251 and applicable regulations.

To the extent that AT&T believes that the Arkansas PSC's decision in Order No. 11 to reverse any particular decision reached in Order No. 5 is inconsistent with the requirements of federal law, its remedy, of course, is to appeal any final decision approving an agreement based on

Order No. 11 to federal district court under section 252(e)(6). AT&T has on many occasions invoked its rights under the judicial review provisions to seek review of other State commission decisions on the grounds that such decisions were inconsistent with the requirements of federal law.

9. In light of Order No. 11, must SWBT unbundle dark fiber?

No. The Arkansas PSC has reversed the decision in Order No. 5 in which it had incorrectly determined that SWBT was obligated under section 251(c)(3) to unbundle "dark fiber." As State commissions throughout the country have found, "dark fiber" is not a "network element" because it is merely inventory that is not "used" in the provision of a telecommunications service.[1] In SWBT's view, the Arkansas PSC was mistaken in Order No. 5 when it concluded

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[1]*See, e.g., Interconnection Agreement Negotiations Between AT&T Communications and BellSouth Telecommunications, Inc.*, No. 96-AD-0559, at 27-28 (Miss. PSC Feb. 12, 1997) ("BellSouth should not be required to provide dark fiber as an unbundled network element"); *Interconnection Agreement Negotiations Between AT&T Communications of the South Central States and BellSouth Telecommunications, Inc.*, No. U-22145, at 43 (La. PSC Jan. 15, 1997) (dark fiber "is by definition unused, and therefore it is not a 'network element'"); *Petitions by AT&T Communications of the Southern States, Inc.*, No. 960833-TP, at 22 (Fla. PSC Dec. 31, 1996) ("we find that dark fiber is not a network element, as defined by the Act, because it is not a facility or equipment used in the provision of a telecommunications service"); *Petition of MCI Telecommunications Corp. for Arbitration to Establish an Intercarrier Agreement Between MCI and New York Tel. Co.*, No. 96-33, at 25 (NY PSC Dec. 23, 1996) (PSC "agree[s]" that "New York Telephone has no obligation under the Act to provide dark fiber"); *Petition of MCI Metro Access Transmission Services, Inc. for Arbitration to Bell Atlantic-PA, Inc.*, No. A-310236F0002, at 25 (Pa. PUC Dec. 19, 1996) ("Bell is not required to unbundle dark fiber"); *Petition of MCI Telecommunications Corporation for Arbitration With Bell Atlantic*, No. T096080621, at 11 (N.J. PUC Dec. 19, 1996) ("dark fiber should not be made available to local competing carriers"); *Petition of AT&T Communications of Indiana, Inc. Requesting Arbitration*, No. 40571-INT, at 17 (Ind. PUC Dec. 12, 1996) ("GTE is not required to provide access" to dark fiber); *AT&T Communications of Washington, D.C., Inc. Petition for Arbitration with Bell Atlantic*, Case 1, at 23 (DC PSC Dec. 2, 1996) (dark fiber is "not a network element and. . . BA-

that "dark fiber" should be unbundled. Its decision to correct that mistake in Order No. 11 was sound. If AT&T disagrees, it is free to seek relief in federal district court.

10. In light of Order No. 11, may the Arkansas Commission continue to consider all resale restrictions to be presumptively unreasonable, including restrictions contained in SWBT's tariffs?

Yes. Nothing in Order No. 11 suggests that the Arkansas PSC will not consider resale restrictions presumptively unreasonable. Section 251(c)(4)(B) of the federal Act clearly provides that an incumbent LEC has the duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of . . . telecommunications service[s]." The FCC's rules provide that "an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b). Although incumbent LECs are certainly permitted to demonstrate to the Arkansas PSC that a particular resale restriction is reasonable and should, therefore, be upheld, the federal Act and the FCC's interpretive regulations clearly place the burden on the incumbent LEC to make such a showing.[2] In any case, what is clear is that the FCC left it to State commissions to determine

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DC is not required to provide unbundled access"); *Application of MCI Telecommunications Corp. for Arbitration with GTE California, Inc.*, No. 96-09-012, at 34 (Cal. PUC Sept. 10, 1996) ("Since dark fiber is not used to provide telecommunications services . . . GTEC should not be required to unbundle its dark fiber"); *Petitions for Approval of Agreements and Arbitration of Unresolved Issues*, No. 8731, Order No. 73010, at 26 (Md. PSC Nov. 8, 1996) (the Commission "disagree[s] with AT&T and MCI that Bell Atlantic should be required to provide" dark fiber).

[2]Of course, there remains an important distinction between a resale restriction — which is presumptively unreasonable — and a feature inherent in the retail service itself — which is simply how the service is defined. Although the FCC has concluded that resale restrictions "include conditions and limitations contained in the incumbent LEC's underlying tariff" (*Local Competition Order*, 11 FCC Rcd at 15966 [¶ 939]), the statute imposes a duty on incumbent LECs "to offer

whether a particular restriction is reasonable and nondiscriminatory. 47 C.F.R. § 51.613(b). Once again, if AT&T disagrees with a determination by the Arkansas PSC that a particular limitation in SWBT's tariff is reasonable, its remedy is to appeal a final decision approving an agreement to federal district court.

11. Are the reasoning and result of Order No. 11 based only on section 9(f) of the Arkansas Act? If not, please describe what and how other sections of the Arkansas Act are involved.

In Order No. 11, the Arkansas PSC principally relied on section 9(f), even though the General Assembly made clear throughout the Arkansas Act that it intended for the Act to be applied in a manner that is consistent with the requirements of federal law.[3] In particular, section 2(1) states that it was the intent of the General Assembly in enacting the Arkansas Act to "[p]rovide for a system of regulation of telecommunications services, *consistent with the Federal Act*, that assists in *implementing the national policy* of opening the telecommunications market to competition on fair and equal terms, modifies outdated regulation, eliminates unnecessary regulation, and preserves and advances universal service." Arkansas Act § 2(1) (emphasis added).

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for resale at wholesale rates any telecommunications service that the carrier provides *at retail* to subscribers who are not telecommunications carriers," 47 U.S.C. § 251(c)(4)(A) (emphasis added). It is, therefore, also true that services that are *not* provided at retail need *not* be provided for resale.

[3]In SWBT's view, section 9(f) simply reflects the same requirement contained in section 252(b)(4)(A) — that a State commission should limit its consideration of any request for arbitration to the issues left unresolved in the negotiations and presented in the petition for arbitration. In other words, section 9(f) merely limits the Arkansas PSC's authority to arbitrate and approve an agreement to the terms and conditions that were subject to actual negotiations between the ILEC and the CLEC.

Furthermore, the General Assembly explicitly determined that "[i]t is essential that the State of Arkansas immediately revise its existing regulatory regime for the telecommunications industry to ensure that it is *consistent with and complementary to the Federal Telecommunications Act of 1996*." *Id.* § 16(III) (emphasis added).

Section 9(f) is not the only section of the Arkansas Act cited in Order No. 11. The Arkansas PSC also invokes sections 6, 7, 8, and 11 of the Arkansas Act to support its assertion that it has "no authority to obtain information or investigate any financial information of SWBT, including cost studies to verify the accuracy of SWBT's filing" (Order No. 11 at 5). But this is simply incorrect. Nothing in any of these sections denies the Commission the right to obtain information from SWBT or to investigate information obtained from SWBT. Indeed, there remains ample authority under state law for the Commission to investigate pricing issues in an arbitration proceeding.[4]

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[4]*See, e.g.*, Ark. Code. Ann. § 23-2-309 (1997) (authorizing the PSC to require "persons, firms, associations, or corporations, so far as they may be subject to its jurisdiction under the terms of this act, to furnish any information which may be in his, its, or their possession respecting the rates, tolls, fares, charges, or practices in conducting his, its, or their service"); *id.* § 23-2-308(a)(2) (PSC may require any public utility to file "[s]pecial reports concerning any matter about which the commission is authorized to inquire or to keep itself informed"); *id.* § 23-2-310(a)(1) ("whenever it may be necessary in the performance of its duties, [the PSC] may investigate and examine the condition and operation of public utilities or any particular utility"). It is true, as a result of section 11(f) of the Arkansas Act, section 23-3-118 no longer applies to electing local exchange carriers, such as SWBT. This means that the PSC is no longer able to *initiate* an investigation "on its own motion, with or without notice," *id.* § 23-3-118. But this does nothing to prevent the PSC from conducting an investigation in a proceeding that is already underway pursuant to an entirely separate statutory scheme.

The Arkansas PSC was simply wrong to conclude that "due to [its] limited ability to investigate SWBT's cost and pricing, [it] must presume without a specific finding that SWBT is in compliance with Act 77" (Order No. 11 at 5). The PSC has clear authority under state law to conduct a thorough investigation of the pricing issues in an arbitration proceeding; the General Assembly ensured that the Arkansas PSC would have sufficient authority to satisfy its federal obligation to establish the rates for interconnection, services, or network elements. 47 U.S.C. § 252(d). The Senate and House Interim Committees on Insurance and Commerce condemned the decision of the Arkansas PSC, advising the PSC "that it has ample authority under federal law as well as Section 9 of Act 77 and other state regulatory statutes to take all steps necessary to fully investigate and resolve issues regarding the implementation of competition in the Arkansas telecommunications market." Interim Resolution 97-17 (Feb. 25, 1998). The Governor of Arkansas has sent a letter to the PSC reflecting the same view. Letter from Gov. Mike Hukabee to Arkansas PSC (Feb. 27, 1998). In its motion for reconsideration and/or clarification of Order No. 11, SWBT will argue that the PSC should investigate the pricing issues and assume its responsibility under both state and federal law.

12. Assuming, *arguendo*, that Order No. 11 reflects the Arkansas Commission's view that section 9 of the Arkansas Act precludes the Arkansas Commission from imposing on incumbent LECs any interconnection, unbundling, or resale obligation beyond those specified in the *Local Competition Order*, should the FCC preempt section 9 pursuant to either section 253 of the Communications Act or the FCC's "conflict" preemption authority under the Supremacy Clause? Please explain your response in detail.

There is nothing wrong with the Arkansas PSC's view that the Arkansas Act precludes the imposition of any obligation beyond those specified in the *Local Competition Order* or in the

federal Act itself. There is no ground to preempt such a decision either under section 253 or under general conflict preemption principles.

As SWBT explained in its comments in both the ACSI and MCI proceedings, preemption under section 253 requires that the party challenging a state legal requirement demonstrate that this requirement has the effect of prohibiting the ability of any entity to provide a telecommunications service. As the FCC recently concluded, a petitioner seeking preemption must demonstrate with actual evidence and a specific showing that a particular requirement prohibits or has the effect of prohibiting an entity from providing a telecommunications service. *See Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, FCC 97-346, CCBPol 96-13, et al., ¶ 97 (rel. Oct. 1, 1997) ("*Texas Preemption Order*") (rejecting AT&T's challenge to certain provisions of the Texas statute on the grounds that "AT&T has not attempted to show" that the challenged provisions violate section 253(a)). Neither MCI nor ACSI has made any showing *at all* that section 9 has the effect of prohibiting it from providing a telecommunications service. Preemption under section 253 is therefore entirely inapplicable.

The standard for "conflict preemption" is well settled: "state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); *see Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Texas Preemption Order* ¶¶ 50-54. The ultimate question is whether

Congress intended that federal regulation supersede state law. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In the federal Act, Congress explicitly provided that states were free to impose additional requirements "to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with [section 251 through 261] or the Commission's regulations to implement this part." 47 U.S.C. § 261(c). Order No. 11 reflects the Arkansas PSC's view that section 9 of the Arkansas Act precludes it from imposing any interconnection, unbundling, or resale obligation beyond those specified in either the *Local Competition Order* or the federal Act itself. There is, therefore, no conflict between the Arkansas Act and federal law.

13. To whom does the Communications Act delegate the authority to determine whether an arbitrated interconnection agreement meets the requirements of section 251, the States or state commissions? If the latter, please explain whether the Communications Act precludes a State from directing its state commission to deem the requirements of section 251 and the requirements of the FCC's *Local Competition Order* to be the same.

Under the Communications Act, a "State commission" is defined as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41). The question of which entity within a particular state has "regulatory jurisdiction with respect to intrastate operations of carriers" is one of state law. Clearly, in Arkansas, the General Assembly has assigned this responsibility to the Arkansas PSC.

Under the Communications Act, "the State commission shall . . . ensure" that the resolution of any open issues and the imposition of any conditions upon the parties to the

agreement "meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. § 252(c). Once an agreement is adopted by arbitration, a State commission may only reject it "if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the [pricing standards]." Id. § 252(e)(2)(B). It is clear, therefore, that it is to the State commission that the Communications Act delegates the authority to determine whether a particular arbitrated interconnection agreement meets the requirements of section 251.

In Arkansas, however, the PSC is a creature of the State; it has no rights or authority beyond that which the General Assembly chooses to grant.[5] Just as Arkansas is free to empower its PSC to impose certain obligations beyond those mandated by federal law, it is also free to withhold from the PSC the ability to impose additional requirements not mandated by federal law. Arkansas cannot, however, withhold from the PSC the ability to follow *all* the requirements of federal law, including *both* the requirements of section 251 *and* the requirements of the FCC's *Local Competition Order* (to the extent there are any differences between the two). Nor has Arkansas done so here. The Arkansas General Assembly has simply chosen to prohibit the PSC from imposing local interconnection, unbundling, or resale requirements beyond those that are required by section 251 — including the requirements of the *Local Competition Order* — thereby

[5] *See, e.g., Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 593 S.W.2d 434, 440 (Ark. 1980) ("It must be remembered that the PSC is a creature of the legislature . . . . The commission was created to act for the General Assembly and it has the same power that body would have when acting within the powers conferred upon it by legislative act").

seeking to avoid what it perceived to be a potential threat to the best interests of the citizens of Arkansas.

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
State Capitol
Little Rock 72201

Mike Huckabee
Governor

February 27, 1998

Public Service Commission
1000 Center St.
Little Rock, AR 72201

Commissioners:

On February 4, 1997, I signed into law the Arkansas Telecommunication Regulation Reform Act of 1997 (Act 77). Arkansas Code Annotated §23-17-401 *et seq*.

This legislation, overwhelmingly passed by the General Assembly, promotes the development of competition in the Arkansas telecommunications market. The stated objective of the act is to provide a system of regulation consistent with and pursuant to the requirements of the Federal Telecommunication Act. The Public Service Commission is charged to facilitate the stated regulatory reforms.

I am aware that the Commission recently ruled that the regulatory reforms contained in the Act prevent you from fulfilling your duties under the federal act. I concur with the joint resolution passed yesterday by the House and Senate Interim Committees on Insurance and Commerce which directs you to implement the act consistent with the Federal Act.

I urge you to take the necessary steps to insure that you are properly implementing the Act.

Sincerely yours,

Mike Huckabee

MH:ll